(2)

No. 10-53

IN THE

Supreme Court of the United States

BRENDAN DOLAN, *et al.*,

Petitioners,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the Second Circuit's summary order applied the well-established filed rate doctrine to bar Petitioners' challenge to title insurance rates filed with and approved by the New York State Insurance Department.

CORPORATE DISCLOSURE STATEMENT

Counsel for Respondents Fidelity National Financial, Inc., Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Commonwealth Land Title Insurance Company, and Lawyers Title Insurance Corporation certify that:

- Fidelity National Financial, Inc. is a publicly traded corporation. No publicly held corporation owns 10% or more of Fidelity National Financial, Inc.'s stock.

- Fidelity National Financial, Inc. is the parent corporation of the wholly-owned subsidiary Fidelity National Title Group, Inc.

- Fidelity National Title Group, Inc. is the parent corporation of the wholly-owned subsidiary Chicago Title and Trust Company.

- Chicago Title and Trust Company is the parent corporation of the following wholly-owned subsidiaries: Fidelity National Title Insurance Company and Chicago Title Insurance Company.

- Ticor Title Insurance Company has merged into Chicago Title Insurance Company.

- Lawyers Title Insurance Corporation has merged into Fidelity National Title Insurance Company.

- Chicago Title Insurance Company is the parent corporation of Commonwealth Land Title Insurance Company, a wholly-owned subsidiary.

Counsel for Respondents The First American Corporation, First American Title Insurance Company of New York, and United General Title Insurance Company certify that:

- The First American Corporation was a publicly traded corporation. The First American Corporation is now known as CoreLogic, Inc. No publicly held corporation owns 10% or more of CoreLogic, Inc.'s stock.

- First American Title Insurance Company of New York and United General Title Insurance Company are wholly-owned subsidiaries of First American Title Insurance Company, which in turn is a wholly-owned subsidiary of First American Financial Corporation. First American Financial Corporation is a publicly traded corporation, and no public company owns 10% or more of First American Financial Corporation's stock.

Counsel for Respondents Stewart Information Services Corporation, Stewart Title Insurance Company, Stewart Title Guaranty Company, and Monroe Title Insurance Corporation certify that:

- Stewart Information Services Corporation is a publicly traded corporation. No publicly held corporation owns 10% or more of Stewart Information Services Corporation's stock other than Wells Fargo & Company and its subsidiaries.

- Stewart Title Guaranty Company is a wholly owned subsidiary of Stewart Information Services Corporation.

- Stewart Title Insurance Company and Monroe Title Insurance Corporation are indirectly wholly owned by Stewart Information Services Corporation.

Counsel for Respondent Title Insurance Rate Service Association, Inc. certify that:

- Title Insurance Rate Service Association, Inc. is a New York not-for-profit corporation and has no corporate parents, subsidiaries or affiliates that are publicly held.

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INTRODUCTION

Petitioners seek review of the Second Circuit's summary order affirming the Eastern District of New York's dismissal of their Consolidated Class Action Complaint. The complaint alleges that Respondents – title insurance companies, their corporate parents, and the Title Insurance Rate Service Association, Inc. ("TIRSA") – conspired to fix title insurance rates in New York in violation of the Sherman Act and New York state law. TIRSA, a state licensed rate service organization, files proposed rates with the Insurance Department on behalf of its title insurer members. Once title insurance rates are approved by the Insurance Department, they are the only rates New York law permits Respondents to charge. The Second Circuit determined, in an unpublished summary order in line with nearly a century of this Court's case law and the decisions of other circuit courts across the country, that the filed rate doctrine bars claims such as Petitioners' challenging the reasonableness of these rates.

Petitioners have presented no "compelling reasons" for their Petition for a Writ of *Certiorari* (the "Petition") to be granted. Sup. Ct. R. 10. Petitioners fail to demonstrate that the Second Circuit's decision conflicts with a decision of this Court or any circuit court, or that the Second Circuit decided an important federal question that has not been settled by this Court. Sup. Ct. R. 10(a), (c). In fact, the decision below follows settled filed rate doctrine law from this Court and accords with the decisions of other circuit courts and five other district courts in parallel litigation brought in other states. Petitioners' complaint is nothing more

than an impermissible request for a federal district court to inject itself into New York's title insurance regulatory framework in order to replace the Insurance Department's judgment about title insurance rates in New York with the court's judgment. This request is precisely what this Court and the circuit courts have repeatedly held to be prohibited by the filed rate doctrine.

In an attempt to repackage the arguments rejected by the district court and the Second Circuit, Petitioners focus their Petition and question presented on a footnote in *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978). While the Petition accuses the Second Circuit of "sidestep[ping]" the *Trans Alaska* case, Petition at 9, Petitioners cited it just two times in passing in almost 100 pages of briefing to the district court and the Second Circuit. In any event, *Trans Alaska* does not address the filed rate doctrine. It does, however, recognize that "federal courts have no power to make 'an independent appraisal of the reasonableness of rates,'" 436 U.S. at 638 n.17 (internal citation omitted), which is precisely what Petitioners seek in this case.

Petitioners also attempt to create the appearance of a circuit split where none exists. As set forth *infra*, all of the cases Petitioners cite in support of their supposed circuit split either have no bearing on the application of the filed rate doctrine in this case or are in complete harmony with the Second Circuit's summary order. Indeed, Petitioners ignore the numerous cases that have been decided by federal courts across the country – including in circuits that Petitioners claim to

be "split" with the Second Circuit – that uphold the application of the filed rate doctrine in situations nearly identical to the current case.

Despite Petitioners' attempt to paint the Second Circuit's summary order as a radical departure from filed rate doctrine law, this is a simple case that challenges the reasonableness of title insurance rates approved by the New York State Insurance Department. Petitioners have failed to establish any compelling reason to review the order. The Petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. The New York State Insurance Department Sets Title Insurance Rates Pursuant to a Legislatively Adopted Regulatory Scheme

In New York, title insurance is governed by a detailed statutory framework. N.Y. Ins. Law § 2301 (Pet. App. at 39a), *et seq.*[1] Pursuant to this comprehensive framework, the New York State Insurance Department has the authority to regulate title insurance rates. *Id.* New York law requires title insurers to file rate proposals with the Superintendent of the Insurance Department. N.Y. Ins. Law § 2305(b) (Pet. App. at 46a-47a). Additionally, "[e]very title insurance corporation shall file with the superintendent its rate manual, if any, its basic schedule of rates and classification of risks, its rating plan and rules in

[1] References to "Pet. App." are to the appendix submitted to this Court by Petitioners with their Petition.

connection with the writing or issuance of policies of title insurance and shall thereafter likewise file any changes therein." N.Y. Ins. Law § 6409 (Pet. App. at 72a).

New York's Insurance Law also expressly authorizes "[c]ooperation among rate service organizations or among rate service organizations and insurers in rate making." N.Y. Ins. Law § 2313(o).[2] Respondent title insurers discharge their filing obligation by maintaining membership in TIRSA, an "association of title insurers licensed as a rate service organization pursuant to Article 23 of the Insurance Law." Compl. ¶ 37 (Pet. App. at 89a). In 1991, the Insurance Department licensed TIRSA to act as a rate service organization. *See* N.Y. State Ins. Dept. Memo. Decision & Opinion, dated Nov. 19, 1991 (Pet. App. at 132a-133a). TIRSA submits information to the Insurance Department on behalf of its members regarding existing insurance rates and proposes changes to those rates. *See* N.Y. Ins. Law § 2313(a). Rates do not go into effect unless and until they are approved by the Insurance Department. N.Y. Ins. Law § 2305(b) (Pet. App. at 46a-47a).

Rate proposals must be "accompanied by the information upon which the insurer supports the rate," N.Y. Ins. Law § 2305(c) (Pet. App. at 47a-48a), which may include the "interpretation of any statistical data [the filing] relies upon," the "experience or judgment of the insurer or rate service organization making the

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[2] The Superintendent has the power to "review such cooperative activities and practices" and conduct hearings to determine if "any such activity or practice is unfair or unreasonable." N.Y. Ins. Law § 2313(o).

rate," the "experience of other insurers or rate service organizations," and "any other relevant factors." N.Y. Ins. Law § 2304(b) (Pet. App. at 41a). The Insurance Department has a duty to ensure that the rate proposals are not "excessive, inadequate or unfairly discriminatory." N.Y. Ins. Law § 2301 (Pet. App. at 39a). Additionally, TIRSA must submit to the Insurance Department a statistical report showing premiums and losses as well as "such other information as the superintendent may deem necessary or expedient for the administration of the provisions" of the Insurance Law addressing insurance rates. N.Y. Ins. Law § 2315(a) (Pet. App. at 52a-53a). Pursuant to this requirement, TIRSA annually files revenue, expense, and loss information with the Insurance Department. Compl. ¶ 38 (Pet. App. at 89a-90a).

Title insurance companies are prohibited from charging any title insurance rate unless and until that rate has been filed with and approved by the New York State Insurance Department. N.Y. Ins. Law § 2305(b) (Pet. App. at 46a-47a). Once the Insurance Department has approved a new title insurance rate, that rate becomes the only legal rate and title insurers are not permitted to deviate from it unless a new rate is filed with and approved by the Insurance Department. N.Y. Ins. Law § 6409(b) (Pet. App. at 72a-73a) ("After any such filing no such corporation shall, in connection with the writing or issuance of any such policy, deviate from the rates, classifications of risks and rules last filed by it, either by making any reduction in rates without having filed the same as herein provided, or by way of any discriminations in favor of or against any insured.").

B. Every TIRSA Rate Filing That Went Into Effect Was Reviewed And Approved By The New York State Insurance Department

During its 19-year existence, TIRSA has made only three filings with the New York State Insurance Department proposing increases in base title insurance rates. After evaluating those three requests and reviewing supporting materials, the Insurance Department rejected one request, reduced another request, and expressly approved every rate that went into effect. First, in March 1993, TIRSA submitted a rate filing to propose "an overall revenue increase of 15.89%," including within that "a proposed 5.5% increase in the title insurance rate level itself." N.Y. State Ins. Dept. Memo. Decision & Opinion, dated Aug. 12, 1993, at 2 (JA 91).[3] After conducting "a comprehensive analysis of the title insurance industry" – which included "perform[ing] independent analyses, appl[ying] different methodologies, and conduct[ing] various tests to determine the proper rate need" – the Insurance Department rejected this rate request. *Id.* at 3 (JA 92). Second, in November 1995, TIRSA submitted a filing requesting a revision in base rates. *See* Apr. 2, 1996 Letter from E. Muhl to G. Paquin (JA 110). The Insurance Department approved this rate request, but only after TIRSA "amended the . . . filing by requesting that the proposed base rate revision be reduced to +6%." *Id.* Finally, on September 26, 2001 – more than five years after the Insurance Department approved the previous rate increase – TIRSA submitted a new rate

[3] References to materials in the Joint Appendix in the Court of Appeals are in the form "JA _."

filing. *See* Nov. 5, 2001 Letter from G. Serio to G. Paquin (JA 111). After the Insurance Department requested and received "follow-up correspondence" from TIRSA, the Department approved the rate filing. *Id.* The basic title insurance rates have not changed in the nine years since the 2001 increase.[4]

C. Petitioners' Complaint Seeks Damages For Alleged "Overcharges" And "Overpayments"

Petitioners do not dispute that every title insurance rate they were charged was expressly approved by the New York State Insurance Department. Nevertheless, they allege that the rates are the result of an illegal price-fixing conspiracy. *See, e.g.*, Compl. ¶¶ 5, 67, 77, 80 (Pet. App. at 80a, 100a, 103a, 104a). Petitioners requested that the district court, among other things, award damages to "compensate them for the overcharges they incurred" and require Respondents to "return to [Petitioners] and the Class all overpayments" made to Respondents. Compl. Prayer for Relief ¶¶ C, E (Pet. App. at 111a); *see also* Compl. ¶ 6 (Pet. App. at 80a) (Petitioners "bring this action to . . . recover damages for the illegal overcharges the Class has paid").

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[4] Insurance Department documents regarding rate filings are state administrative public records, N.Y. Ins. Law § 2305(b)(7) (Pet. App. at 46a-47a), and therefore are judicially noticeable. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (permitting district court to take judicial notice of "public disclosure documents required by law to be filed, and actually filed, with the SEC"). Petitioners did not object to the lower courts considering the Insurance Department's public records and, in fact, rely on some of those documents in their Petition. *See, e.g.*, Petition at 7.

D. The Second Circuit Applied The Filed Rate Doctrine To Affirm Dismissal of Petitioners' Complaint In Its Entirety And With Prejudice

Respondents moved to dismiss Petitioners' complaint, and the district court correctly held that "[t]he title insurance rates filed by [Respondents] unquestionably fall under the scope of the filed rate doctrine." Dist. Ct. Order (Pet. App. at 16a). On appeal, the Second Circuit rejected all of Petitioners' arguments as to why the filed rate doctrine should not apply to their claims.

First, the Second Circuit rejected Petitioners' argument that the challenged rates were improperly filed, noting that Petitioners "do not allege [Respondents'] failure to file [the requisite] information." Second Cir. Order (Pet. App. at 4a). Second, the Second Circuit rejected Petitioners' argument that the Insurance Department lacked authority over title agents by affirming that "the Department clearly has authority over title insurance rates." *Id.* (Pet. App. at 5a) (citing N.Y. Ins. Law § 6409(b)). Third, the Second Circuit rejected Petitioners' argument that they merely sought to enforce requirements of New York's Insurance Law, finding that the law "does not confer on plaintiffs a private right of action." *Id.* (Pet. App. at 7a). Fourth, the Second Circuit rejected Petitioners' argument that New York's title insurance regulation is not sufficiently "pervasive" and "comprehensive," holding that the filed rate doctrine applies to "any 'filed rate'" and forbids courts from intervening and "set[ting] New York title insurance rates." *Id.* (Pet. App. at 7a-8a) (internal

citation omitted). The Second Circuit relied on well-settled law from this Court and circuit courts across the country and invoked a key tenet of the filed rate doctrine – the "'historical antipathy to rate setting by courts'" that counsels "respect for the judgment and expertise of regulators charged with approving rates." *Id.* (Pet. App. at 5a) (quoting *Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (Posner, J.)).

REASONS FOR DENYING THE PETITION

I. THIS CASE FALLS SQUARELY WITHIN THE WELL-ESTABLISHED CONTOURS OF THE FILED RATE DOCTRINE

The filed rate doctrine has barred complaints like Petitioners' for nearly a century. *Keogh v. Chicago & Nw. Ry. Co.*, 260 U.S. 156 (1922) (affirming dismissal of antitrust challenge to rates filed with ICC). The doctrine holds that "any 'filed rate' – that is, one approved by the governing regulatory agency – is *per se* reasonable and unassailable in judicial proceedings brought by taxpayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994) (emphasis added); *see also* IA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 247 (3d ed. 2006) ("The doctrine operates as a rule against collateral attack: once filed, a rate may not be collaterally attacked in the courts."). This simple and straightforward doctrine is consistently applied by federal courts across the country. *See, e.g., Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507 (5th Cir. 2005) ("The filed rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair

or unlawful."); *Utilimax.com, Inc. v PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004) (The filed rate doctrine "bars antitrust suits based on rates that have been filed and approved by federal agencies."); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (where administrative agency is given power to "determine the reasonableness of a rate," the ratepayer "'can claim no rate as a legal right that is other than the filed rate'") (quoting *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

The filed rate doctrine applies whenever a court is presented with claims that would require it to calculate relief by comparing the rate that was approved by the governing regulatory agency with a hypothetical rate that might have been obtained absent the defendants' challenged conduct. "[O]nly by determining what would be a reasonable rate absent the [alleged conduct] could a court determine the extent of damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids." *Wegoland*, 27 F.3d at 21; *see, e.g.*, *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1226 (9th Cir. 2007) (claims precluded where plaintiff "seeks what amounts to having the courts determine what rates" should have been charged which "would inevitably drag the courts into a determination of what rate would be fair and proper"); *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 669 (7th Cir. 2005) ("[C]ourts may not award relief . . . that would have the effect of imposing any rate other than that reflected in the filed tariff."); *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (doctrine bars "claims when the measure of damages is determined by

comparing the approved rate and the rate that allegedly would have been approved absent the wrongful conduct").

As a result, this Court has held in multiple cases that a plaintiff cannot assert claims based on the allegation that a rate filed with a regulatory agency is nonetheless unlawful because it was the result of alleged wrongdoing. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994) ("[T]he Court has protected regulated firms from some types of antitrust suits brought on the basis of their filed rates."); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986) ("[A]n award of treble damages is not an available remedy" for a private litigant "claiming that the rate submitted to, and approved by, the [regulatory agency] was the product of an antitrust violation.").

Given this well-settled jurisprudence, the district court and the Second Circuit correctly held that Petitioners' claims are barred by the filed rate doctrine. As the Second Circuit recognized, Petitioners "do not dispute that the challenged title insurance rates are filed with the New York Insurance Department" and "do not allege [Respondents'] failure to file th[e] information" required under the Insurance Law. Second Cir. Order (Pet. App. at 3a-4a). Moreover, Petitioners concede that Respondents' rates "have been submitted and they have been approved" by the Insurance Department. Tr. of Dist. Ct. Oral Arg. at 16:3-6 (JA 184). As the district court held in dismissing this case, "[n]othing more is required for the filed rate doctrine to apply." Dist. Ct. Order (Pet. App. at 16a-17a).

Petitioners ask the courts to do with these filed rates exactly what courts uniformly agree the filed rate doctrine prohibits – usurp the Insurance Department's authority and make a judicial determination of a reasonable rate. Petitioners' requested relief would require a court to entangle itself in the rate-making process and determine a reasonable rate, awarding damages that would "compensate them for the *overcharges* they incurred" and requiring the return of "all *overpayments*" to Respondents. Compl. Prayer for Relief ¶¶ C, E (Pet. App. at 111a) (emphasis added). In order to determine the amount of the "overcharges" or "overpayments," a court would have to determine the rate that should have been charged instead of the filed rate. As the Second Circuit explained, Petitioners "effectively ask[ ] this court to set New York title insurance rates," and "[i]t is clear that the filed rate doctrine forbids [the court] from doing so." Second Cir. Order (Pet. App. at 8a).

Petitioners attempt to escape this inevitable result by arguing that their claims are not "challenges [ ] to the reasonableness of a filed rate." Petition at 4. However, their own words belie that assertion. In the complaint, Petitioners allege that they have had to "pay significantly more for title insurance" than they would have had the Insurance Department calculated the correct rates. Compl. ¶ 98 (Pet. App. at 108a). Petitioners also acknowledge that they seek to have federal courts "'strip from the rates all prohibited and otherwise unauthorized costs.'" Second Cir. Order (Pet. App. at 8a) (quoting Appellants' Br. at 32). This is precisely what the filed rate doctrine forbids. Petitioners cannot now avoid the impact of the filed rate doctrine

by disingenuously stating that their lawsuit is not about conforming filed rates to their view of what is reasonable. *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 490 (2d Cir. 1998) (plaintiff cannot "recharacterize its claim" as plaintiff "may not indirectly accomplish that which it may not do directly").

Petitioners also try to escape the filed rate doctrine by contending that Respondents engaged in unlawful conduct. *See, e.g.*, Petition at 4 (contending that Respondents made "[c]oncerted efforts" to "exploit and exacerbate the regulatory breakdown in New York's title insurance regime" and "pad[ ] their title rates with charges for services entirely unrelated to the issuance of title insurance"); Compl. ¶ 98 (Pet. App. at 108a) (alleging that Respondents "caused substantial anticompetitive effects in the title insurance market" by causing Petitioners to "pay significantly more for title insurance than they would have in the absence of [Respondents'] illegal activity"); *see also, e.g.*, Compl. ¶¶ 3, 55-56, 67, 77-80 (Pet. App. at 79a, 95a-96a, 100a, 103a-104a). But this Court has "never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule." *Maislin Indus. U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 129 (1990). Indeed, this Court has applied the filed rate doctrine in cases just like the present action involving an alleged conspiracy to submit fraudulent inflated rates to a regulator. *See Keogh*, 260 U.S. at 162-63 (doctrine held to bar recovery for antitrust damages against carriers who allegedly colluded to set artificially high shipment rates); *see also Square D*, 476 U.S. at 412 & 417 n.19

(applying filed rate doctrine despite allegations of failure to follow agency procedures and "covert legal violations").[5]

In recent years, numerous district and circuit courts across the country have uniformly held that claims almost identical to Petitioners' – that title insurers engaged in unlawful conduct, including the payment of kickbacks and unlawful agency commissions, in connection with insurance rates filed with the state regulator – are barred by the filed rate doctrine. In so holding, these courts reached conclusions similar to those of the district court and Second Circuit in this case. For example, in a 2009 decision by the district court in the Western District of Texas, later upheld by the Fifth Circuit, the court held:

> Plaintiffs are not alleging they were charged more than the applicable filed rate. Rather, they are claiming that the filed rates are the product of improper conduct. . . . [The] matters at issue within this action fall squarely within the contours of the [filed rate] doctrine.

Winn v. Alamo Title Ins. Co., No. A-09-CA-214-SS, 2010 WL 2102332, at *3, 8 (W.D. Tex. May 14, 2009), *aff'd*, No. 09-50511, 2010 WL 1286890 (5th Cir. Mar. 30, 2010),

[5] Petitioners liken application of the filed rate doctrine to "repeals of the antitrust laws." Petition at 19. But as this Court held in *Square D*, application of the doctrine "is far different from the creation of an antitrust immunity," and entities that engage in anticompetitive activities are still "subject to scrutiny under the antitrust laws," regardless of the doctrine's application. 476 U.S. at 422.

petition for cert. filed, No. 10-19, 2010 WL 2638077 (U.S. June 28, 2010); *see In re Title Ins. Antitrust Cases*, No. 1:08CV677, 2010 WL 1267129 (N.D. Ohio Mar. 31, 2010), *appeal docketed*, No. 10-3545 (6th Cir. Apr. 30, 2010); *In re N.J. Title Ins. Litig.*, No. 08-1425, 2009 WL 3233529 (D.N.J. Oct. 5, 2009), *appeal docketed*, No. 10-3343 (3d Cir. Aug. 10, 2010); *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663 (E.D. Pa. 2009); *McCray v. Fid. Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322 (D. Del 2009), *appeal filed* (3d Cir. Aug. 26, 2010); *Coll v. First Am. Title Ins. Co.*, Nos. CIV 06-348, 06-441, 2008 U.S. Dist. LEXIS 112855 (D.N.M. Apr. 21, 2008), *appeal docketed*, No. 08-2174 (10th Cir. July 31, 2008).

Petitioners also suggest that the doctrine should be discounted because it has been criticized. Petition at 16-17. Petitioners disregard, however, that the doctrine has been consistently applied by courts for nearly a century. *See Tex. Commercial Energy*, 413 F.3d at 508 ("[T]he filed rate is very much a part of current federal antitrust law."); *Daleure v. Kentucky*, 119 F. Supp. 2d 683, 689 (W.D. Ky. 2000) ("The Supreme Court has had numerous opportunities to overrule, modify or water down the filed rate doctrine," but has "consistent[ly] refus[ed] to back away from the rule."). Indeed, this Court refused to abolish the filed rate doctrine when it was invited to do so in *Square D*, 476 U.S. at 424 ("If there is to be an overruling of the *Keogh* rule, it must come from Congress, rather than from this Court."); *see also MCI Telecomms.*, 512 U.S. at 234 ("As we observed in the context of a dispute over the filed-rate doctrine more than 80 years ago, 'such considerations address

themselves to Congress, not to the courts.'") (internal citation omitted). The Court more recently held that "[w]hile the filed rate doctrine may seem harsh in some circumstances, its strict application is necessary." *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) (internal citation omitted). Even Petitioners concede that the cases they cite where courts allegedly "wrestled with the . . . continued application of the filed rate doctrine," do not "merit revoking the doctrine." Petition at 16-17. Whatever criticisms Petitioners offer, this case does not present compelling circumstances for repealing a doctrine to which the Court has "consistently adhered." *Maislin*, 497 U.S. at 128. The Court has made clear that the proper forum for such complaints is Congress, which has had ample opportunity to modify or abrogate the doctrine but has never done so.

II. CONTRARY TO PETITIONERS' CONTENTION, DISMISSAL OF THIS CASE DOES NOT INVOLVE AN EXPANSION OF THE FILED RATE DOCTRINE

The Second Circuit's summary order was a routine application of the filed rate doctrine to rates concededly filed with and approved by a state regulatory agency. Refusing to acknowledge this fact, Petitioners pitch this case as a frightening expansion of the doctrine that will encourage regulatory agencies to disregard their governing law, positing that the non-precedential summary order of the Second Circuit will lead to agencies "across the country" engaging in either "agency excess or complete abdication" of their responsibility, with no one anywhere having any

recourse.[6] Petition at 13; *see also, e.g., id.* at 3 ("The Second Circuit's decision, if allowed to stand, will invite agencies across the country to ignore both the limits of their statutory authority and the ultimate purpose of their legislative command."). Petitioners base these dire predictions on the specious argument that the New York State Insurance Department exceeds its authority in approving filed rates because it does not directly regulate title agents. *Id.* at 5-6, 9 (suggesting a "clear 'regulatory gap'" because "[t]he Insurance Department does not have regulatory authority over title agents or their activities").

The Insurance Department's role in approving title insurance rates is well within – indeed, it is at the very heart of – the Department's statutory authority over title insurance in New York. Pursuant to the New York statutory regime, and as Petitioners concede, *see* Petition at 5, the Insurance Department is the regulatory agency given sole authority to review and approve title insurance rates in the state of New York. The Department is tasked with regulating "insurance rates to the end that [the rates] not be excessive, inadequate or unfairly discriminatory." N.Y. Ins. Law § 2301 (Pet. App. at 39a). The Insurance Department performs this task by ensuring that no title insurance rate goes into effect "until found to comply with all applicable requirements of the Insurance Law and specifically approved by th[e] Department." N.Y. State

[6] The Petition makes no attempt to square its claim that the Second Circuit's summary order will cause havoc "across the country" with its inaccurate contention that the order is in conflict with decisions of five other circuit courts.

Ins. Dept. Memo. Decision & Opinion, dated Aug. 12, 1993, at 2 (JA 91). In fact, "[a]s part of [its] active supervision of the title insurance industry in New York," the Department conducts "an intensive and independent review of the TIRSA rate and rate manual filings" and "demand[s] meaningful answers on all key issues and significant aspects of the filing." *Id.*

Accordingly, whatever authority the Insurance Department does or does not have over title agents, it indisputably has and exercises authority over TIRSA, its title insurer members, and title insurance rates in New York. As the Second Circuit recognized, "[w]hile title insurance agents are excluded from the definition of 'insurance agent' in New York Insurance Law § 2102(a)(4), the Department clearly has authority over title insurance rates, *see id.* § 6409(b)," and "[t]his case . . . directly contests the latter." Second Cir. Order (Pet. App. at 5a). Moreover, the Department clearly believed that it possessed this requisite authority when it made its rate decisions in 1993, 1996, and 2001 – one of which rejected TIRSA's proposal and one of which reduced TIRSA's proposal. As found by the Second Circuit, "[t]o the extent the Department required more information to review the rates, the superintendent had the authority to require such information . . . ." *Id.* (Pet. App. at 4a). In any event, and as the Second Circuit recognized:

> Even if we were to conclude that the Department lacked the expertise to determine the portion of title insurance rates attributable to alleged illegal commissions, we

> would be no more competent than the Department to set title insurance rates, especially when, as here, the agency is charged with balancing a variety of statutory factors to determine their reasonableness.

Id. (Pet. App. at 5a).

Unable to question the Insurance Department's clear statutory authority to set title insurance rates, Petitioners take a different tack in this Court. Petitioners for the first time focus their briefing – and their question presented – on *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), a case challenging a suspension by the Interstate Commerce Commission of certain tariffs which Petitioners rely on to claim that "the filed rate doctrine . . . [does not] appl[y] where the agency has acted arbitrarily, capriciously or outside its authority." Petition at 9. Despite the fact that Petitioners made only two passing references to the *Trans Alaska* case in almost 100 pages of briefing before the district court and Second Circuit, they now fault the Second Circuit for "ma[king] no effort to reconcile its decision with" the case. *Id.* at 11. *Trans Alaska*, however, lends no support to Petitioners' claims. The Court in *Trans Alaska* did not even mention the filed rate doctrine, much less limit its application. In fact, the Court specifically held in *Trans Alaska* that "federal courts have no power to make 'an independent appraisal of the reasonableness of rates,'" 436 U.S. at 638 n.17 (internal

citation omitted), which, as described above, *see supra* 12-13, is exactly what Petitioners have asked the courts to do in this case.[7]

Trans Alaska does, however, illustrate the remedy that Petitioners could have pursued for the alleged shortcomings of the New York State Insurance Department. *Trans Alaska* involved an action filed against a regulatory agency challenging the scope of that agency's authority, not an antitrust action against private parties challenging their adherence to rates filed with and approved by the regulatory agency. Petitioners complain that the Insurance Department "has no understanding of the costs and services [the rates] are supposed to cover," Petition at 2, that it "arbitrarily accept[s] and approve[s] respondents' collectively-set title rates," *id.* at 8, that it "violate[s] its mandate of ensuring reasonable title rates," *id.* at 9, and that it acted "arbitrarily," "capriciously," and "outside its authority" in approving the rates in question, *id.* If those are Petitioners' concerns, New York law provides Petitioners a remedy in the form of an Article 78

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[7] Most of the additional cases that Petitioners cite to support their argument regarding application of the filed rate doctrine similarly do not even mention the doctrine. *See* Petition at 10 n.5. Of the remaining cases, one concerns filed rate claims that are specifically provided for by statute, which is not an issue in this case, *Reiter v. Cooper*, 507 U.S. 258 (1993); *see* Second Cir. Order (Pet. App. at 6a), and another actually applies the filed rate doctrine to bar claims challenging rates and schedules filed with regulators, recognizing that "any claim for excessive rates can be couched" as a claim for other things. *AT&T Co.*, 524 U.S. at 223 (holding that "strict application [of the filed rate doctrine] is necessary").

proceeding against the Department. *See* N.Y. C.P.L.R. 7803(3) (Article 78 proceedings are intended to address "whether a determination was made *in violation of lawful procedure* . . . or was *arbitrary and capricious* or an abuse of discretion") (emphasis added). Such a proceeding would be more appropriate than a treble damages federal antitrust case, to which the Insurance Department is not even a party, based on alleged violations of New York state law. *See, e.g., In re Empire Blue Cross & Blue Shield Customer Litig.*, 622 N.Y.S.2d 843, 846-47 (N.Y. Sup. Ct. 1994) (holding that "inasmuch as plaintiffs' claims . . . are essentially challenging the rates set by [the New York State Insurance Department] as excessive, they are more appropriately pursued in a CPLR Article 78 proceeding," and that "the 'filed rate' doctrine also bars the claims alleged"); *see also Excellus Health Plan, Inc. v. Serio*, 809 N.E.2d 651 (N.Y. 2004) (authority of Superintendent of Insurance Department to review and modify premium rates challenged by health maintenance organization in Article 78 proceeding).

III. PETITIONERS ATTEMPT TO CONCOCT A CIRCUIT SPLIT THAT DOES NOT EXIST

Unable to contest effectively the Second Circuit's application of the filed rate doctrine to bar their claims, Petitioners claim that the Second Circuit's unpublished summary order "directly conflicts" with decisions of the Fifth, Eighth, Ninth, Tenth, and Federal Circuits. Petition at 3. No circuit split exists.

Petitioners broadly claim that courts in other circuits have "explicitly refused to expand the [filed rate]

doctrine" to apply to "an agency that has acted outside its authority." Petition at 13. But, in not one of the cases cited by Petitioners did a court refuse to apply the filed rate doctrine on grounds that a regulatory agency surpassed its statutory authority. In fact, the cases that Petitioners cite to support their concocted circuit split have no bearing on the application of the filed rated doctrine in this action. In many of those cases, the determination not to apply the doctrine was based on factors absent from this case, such as the fact that the rate filings were incomplete and therefore undecipherable on their face, *see Atlantis Express, Inc. v. Associated Wholesale Grocers, Inc.*, 989 F.2d 281, 284 (8th Cir. 1993) (rate void where carrier failed to file portion of rate and "it was impossible to calculate the rate from the information [carrier] properly filed"); *Aberdeen & Rockfish R.R. Co. v. U.S.*, 682 F.2d 1092 (5th Cir. 1982) (filing invalid where it failed to identify rate changes in symbolized form as required), *vacated*, 467 U.S. 1237 (1984), or that the rates directly contravened a statute requiring that carrier rates charged to the military not be higher than rates charged to private shippers, *see Sea-Land Servs., Inc. v. Danzig*, 211 F.3d 1373, 1380 (Fed. Cir. 2000). In other cases cited by Petitioners, the courts addressed the ability of a regulatory agency – not a court – to require departure from the filed rate. *See Interstate Commerce Comm. v. Transcon Lines*, 513 U.S. 138 (1995) (filed rate doctrine does not bar injunction sought by regulatory agency to enforce its own credit regulations); *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006) (doctrine does not preclude lawsuit to enforce regulator's order requiring departure from filed rates).

Petitioners label *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225 (10th Cir. 2007), as being "particularly on point." Petition at 14. As the Second Circuit expressly held, that case is no more applicable to the present action than the others. Second Cir. Order (Pet. App. at 6 n.1). In *TON Services*, the Tenth Circuit considered application of the filed rate doctrine to claims for refunds on rates charged by local exchange carriers to payphone service providers. The court determined that the doctrine did not apply because the defendant had allegedly "failed to timely file tariffs" and because the case did not involve "a challenge to the reasonableness of [defendant's] rates." 493 F.3d at 1237. In fact, the regulatory agency itself (the Federal Communications Commission) had put the telecommunications industry on notice that a refund might be necessary, and the agency's governing statute expressly granted a private federal right of action to challenge the rates. *Id.*; Second Cir. Order (Pet. App. at 6a n.1). In the present case, no comparable order or statute exists, no allegation exists that Respondents did not timely file title insurance rates, and Petitioners' claims challenge the reasonableness of the filed rates. Contrary to Petitioners' portrayal of the case, the opinion in *TON Services* stated that courts have "no power to adjudicate claims which would invalidate, alter, or add to the terms" of defendants' filed rates, 493 F.3d at 1236 (citation and quotation marks omitted), which is exactly what Petitioners seek to do in this case.

Although Petitioners describe the Ninth Circuit's decision in *E & J Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), as "similarly on point," Petition at 15, that case also is inapposite. In *Gallo*, a customer

sued a natural gas supplier for illegal pricing practices. The Ninth Circuit held that the filed rate doctrine was not applicable because the rates at issue were not filed with a regulator and the indices to which the rates were pegged were "comprised of rates that are not [agency]-authorized rates." 503 F.3d at 1048. The Court held, however, that the doctrine *did* in fact apply to "authorized rates." *Id.* Unlike in *Gallo*, no question exists as to whether Respondents filed the title insurance rates with the appropriate regulatory agency.

Petitioners also cite *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), in which they contend the Ninth Circuit refused to apply the filed rate doctrine because "the agencies at issue there – like the New York Insurance Department here – lacked the authority to assess the reasonableness of the filed rates." Petition at 15. In reality, the Second Circuit found in the present case, based on New York Insurance Law, that the New York State Insurance Department has the authority to review and approve title insurance rates. *See* Second Cir. Order (Pet. App. at 5a). Moreover, the record demonstrates that the Department exercised that authority to review rate filings. *See supra* 6-7.

Not only is there no circuit split with regard to the application of the filed rate doctrine in cases like the present action, but numerous cases decided by federal courts across the country – including circuits that Petitioners accuse of a "clear split" with the Second Circuit – uphold application of the doctrine in situations almost identical to this action. *See supra* 14-15; *Winn v. Alamo Title Ins. Co.*, No. 09-50511, 2010 WL 1286890 (5th Cir. Mar. 30, 2010), *petition for cert. filed*, No. 10-

19, 2010 WL 2638077 (U.S. June 28, 2010); *In re Title Ins. Antitrust Cases*, No. 1:08CV677, 2010 WL 1267129 (N.D. Ohio Mar. 31, 2010), *appeal docketed*, No. 10-3545 (6th Cir. Apr. 30, 2010); *In re N.J. Title Ins. Litig.*, No. 08-1425, 2009 WL 3233529 (D.N.J. Oct. 5, 2009), *appeal docketed*, No. 10-3343 (3d Cir. Aug. 10, 2010); *In re Penn. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663 (E.D. Pa. 2009); *McCray v. Fid. Nat'l Title Ins. Co.*, 636 F. Supp. 2d 322 (D. Del 2009), *appeal filed* (3d Cir. Aug. 26, 2010). There is no split among the circuits to be addressed here.

CONCLUSION

For all of the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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